BRB No. 93-1312

WILBUR BOONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY	)	
	)	DECISION and ORDER
Employer/Carrier-Petitioners	)	on RECONSIDERATION
	)	*EN BANC*

Appeal of the Order Granting Claimant's Request for Withdrawal of Claim of N. Sandra Ramsey, District Director, United States Department of Labor.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer has timely filed a Motion for Reconsideration of the Board's Order in this case, *Boone v. Ingalls Shipbuilding, Inc.*, 27 BRBS 250 (1993) (*en banc*) (Brown, J., concurring), wherein the Board dismissed employer's appeal of the Order Granting Claimant's Request for Withdrawal of Claim (OWCP No. 6-107404). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has not responded. We hereby grant employer's motion for reconsideration, but we deny the relief requested.

In this case, claimant filed a claim for compensation on August 3, 1987, alleging work-related asbestos exposure resulting in asbestosis and asbestos-related lung disease. Subsequently, claimant entered into multiple third-party settlements with asbestos manufacturers and distributors. On November 14, 1990, employer filed a Pre-Hearing Statement with the district director, requesting referral of the case to the Office of Administrative Law Judges (OALJ) for a hearing, and it filed a Motion for Summary Decision and Brief in Support with the OALJ. On February 19, 1993, claimant filed a motion to withdraw his claim with the district director. In an Order dated March 18, 1993, the district director approved the withdrawal as being for a proper purpose and in claimant's best interest, as she found that claimant does not have a disability or permanent impairment and has not suffered a diminution of his wage-earning capacity. Because claimant was alive as of the date of the motion for withdrawal, and the Office of Workers' Compensation Programs (OWCP) had not made a determination on his case, the district director approved the withdrawal without prejudice but subject to Section 13, 33 U.S.C. §913, time limitations, in accordance with Section 702.225 of the regulations, 20 C.F.R. §702.225. Order at 1.

Employer then filed an appeal with the Board, challenging the district director's approval of the withdrawal as an abuse of discretion. In its Order dismissing the appeal, the Board determined there was no controversy ripe for adjudication, stating that "employer will not be adversely affected or aggrieved unless or until a new claim is filed." *Boone*, 27 BRBS at 251. Employer now moves for reconsideration of the Board's Order, arguing that the Board erred in dismissing the appeal. Specifically, employer contends the Board erred in failing to address questions of law which are both substantial and ripe and in concluding that employer has not been adversely affected or aggrieved by claimant's withdrawal. Employer contends that the following questions are ripe for adjudication: 1) whether the district director acted contrary to law by failing to refer the case to the OALJ and in allowing claimant to withdraw the claim; 2) whether the district director failed to consider employer's motion for summary judgment and request for a hearing, claimant's failure to satisfy the requirements of Section 33(g), 33 U.S.C. §933(g) (1988), and the applicability of Rule 41 of the Federal Rules of Civil Procedure (FRCP) to the case; and 3) whether the Board erred in affirming approval of claimant's withdrawal and effectively condoning a practice whereby a claimant, in fear of the dismissal of his case, may withdraw it without prejudice to file another.

It is a well-established principle that a claimant may pursue his claim under the Act and also seek damages against a potentially liable third party. *See* 33 U.S.C. §933(a). The Act does not specifically provide for the withdrawal of a claim; however, Section 702.225 of the regulations permits a claimant to withdraw his claim prior to adjudication provided:

(1) He files with the district director with whom the claim was filed a written request stating the reasons for the withdrawal;

(2) The claimant is alive at the time his request for withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.225(a); *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993). Section 702.225(c) describes the effect of a withdrawal as follows:

Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

20 C.F.R. §702.225(c).

Although claimant's withdrawal and the district director's approval of same comply with the regulations, employer contends the district director did not have jurisdiction to address the motion for withdrawal because it had previously filed motions for a hearing and for summary judgment. In the instant case, claimant moved to withdraw his claim and the district director granted the motion three years after employer filed its request for a hearing and motion for summary judgment. Subsequent to the Board's dismissal of this appeal, the United States Court of Appeals for the Fifth Circuit issued its decision in *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994), wherein it held that Section 19 of the Act, 33 U.S.C. §919, imposes a mandatory duty on the district director to transfer the case to the OALJ upon the request of a party.[1] *Asbestos Health*, 17 F.3d at 134; *see also Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794, *reh'g denied*, 279 F.2d 75 (5th Cir. 1960). As the case *sub judice* arises within the jurisdiction of the Fifth Circuit, the court's decision in *Asbestos Health* is controlling. Therefore, it is clear that the district director failed to perform her mandatory duty by not transferring the case to the OALJ upon request. Despite this derogation of duty, and in the interest of judicial efficiency, we decline to grant the relief employer requests because we conclude that the district director's failure to refer the case for a hearing was

[1]Section 19 specifically provides that the district director "shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon[,]" and that the hearing is to be conducted by an administrative law judge. 33 U.S.C. §919(c), (d). Although Section 19 imposes a duty on the district director, the Act does not specify the time period for carrying out that duty or the consequences or effects of a delay by the district director's office. *Cf. Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 184 n.4 (1993). The Fifth Circuit acknowledged this characteristic of the Act and determined that, as it has no statutorily conferred jurisdiction over the acts of the district director, review would be unavailable unless the district court has mandamus jurisdiction. *Asbestos Health*, 17 F.3d at 133. The Fifth Circuit then affirmed the district court's writ of mandamus ordering the district director to forward the cases to the OALJ. *Id.* at 134.

harmless based on the facts of this case.

Initially, we note that the Act does not remove jurisdiction from the district director's office until the case has been referred to the OALJ by the district director. *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 184 n.4 (1993) (formal proceedings may not commence without the knowledge and supervision of the district director). Although the Fifth Circuit affirmed the *Asbestos Health* writ of mandamus, it also remanded the case to the district court for further development of whether the district director should consider any motions for withdrawal prior to referring the cases to the OALJ, noting that withdrawal "would be an unsurprising choice, particularly for those who suffer no current disability and thus only made protective filings." *Asbestos Health*, 17 F.3d at 135-136 n.14. The court further noted that in view of the amended limitations period and that as disability may never develop, claimant, who has no current disability, may never have a claim to pursue. *Id.* Because it appears the Fifth Circuit anticipated the situation we now have before us, where the district director approved the withdrawal of a claim for a proper purpose before addressing the request for a hearing, we agree with the Fifth Circuit's view that "[u]ntil such time as [there is] a claim to pursue, there is scant reason to wage this administrative battle." *Id.* Since there is no claim to pursue, and, in any event, claimant could withdraw his claim at any time, subject to the regulations, *see Henson*, 27 BRBS at 212, the district director's failure to transfer this case to the OALJ was harmless.

Employer also challenges the Board's reliance on *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992), in determining that the issues it presents are not ripe for adjudication. In *Chavez*, the United States Court of Appeals for the Ninth Circuit concluded that the doctrine of ripeness has a justifiable place in Longshore cases, and it discussed the "traditional ripeness analysis." *Chavez*, 961 F.2d at 1414, 25 BRBS at 141 (CRT). The court explained that the first prong of the test, the fitness of issues, is determined by whether the issues are "purely legal" and "sufficiently developed factually," and the second prong, the hardship on the parties, is determined by whether there is a "direct and immediate hardship [which] would entail more than possible financial loss." *Id.*, 961 F.2d at 1414-1415, 25 BRBS at 141-142 (CRT). Further, according to the court, "[l]ack of ripeness will prevent review if the systematic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Id.* For the reasons set forth below, we again conclude that employer has not been adversely affected by claimant's withdrawal of the claim, and that employer has not shown that it would suffer more than a possible financial loss.

In this respect, we reject employer's contention that claimant's case must be dismissed with prejudice, or alternatively remanded to the OALJ for a hearing on the merits. Specifically, employer argues that Rule 41 of the FRCP applies to this case and that voluntary dismissal of a claim without prejudice is improper if the dismissal is sought after the opposing party filed a motion for summary judgment. Rule 41(a), which concerns the effect of voluntary dismissals, provides for the dismissal of a claim without prejudice whether the request for withdrawal is brought by the plaintiff before the defendant files a motion for summary judgment or whether it is approved by the court thereafter.[2] Fed. Rule Civ. P. 41(a). Contrary to employer's argument, a request for dismissal which succeeds a motion for summary judgment does not violate Rule 41(a)(1); instead, it invokes Rule 41(a)(2), which, after approval of the court, also results in a dismissal without prejudice. *See Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 728 F.Supp. 1142 (D.N.J. 1990). Therefore, application of Rule 41(a) would not alter the outcome of this case. Moreover, the Federal Rules do not apply to the Act in situations governed by statute or regulation. *See* 33 U.S.C. §923(a); 29 C.F.R. §18.1(a). Because Section 702.225 of the regulations to the Act addresses the issue and provides for withdrawals without prejudice, it controls this case.

As the Board stated in its initial Order in this case, employer cannot be aggrieved by the district director's action until a new claim is filed. *Boone*, 27 BRBS at 251. We note that until this time, employer cannot be liable for benefits or deficiency compensation. *See* 33 U.S.C. §933(f) (1988). In this regard, we reject employer's contention that claimant's "admission" that he failed to comply with the provisions of Section 33(g) bars any future claims claimant may have related to his exposure to asbestos. The Supreme Court of the United States has determined there are two situations in which an employee need not obtain prior written approval of a third-party settlement: where the employee obtains a judgment against a third party and where the employee and the third party settle the claim for an amount greater than or equal to employer's liability under the Act. *Estate*

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[2]Rule 41(a) of the FRCP states in pertinent part:

> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. . . .
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
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> Fed. R. Civ. P. 41(a).

of Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S.Ct. 2589, 2597, 26 BRBS 49, 53 (CRT) (1992); *see also Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186, *aff'd on recon.*, 27 BRBS 112 (1993). To comply with the provisions of Section 33(g) in those instances, an employee need only notify the employer of its third-party settlement before the employer makes any payments or the agency announces any award. 33 U.S.C. §933(g)(2) (1988); *Glenn*, 26 BRBS at 192; *see also Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 562, 24 BRBS 49, 54 (CRT) (9th Cir. 1990). As claimant in this case is not entitled to compensation under the Act because he withdrew his claim and has no compensable disability, he clearly could not settle his third-party claims for *less than* what he is entitled to under the Act; thus, if the previously filed claim were adjudicated, Section 33(g)(1) would not bar claimant's recovery. Further, claimant notified employer of the third-party settlements before any payments were made or an award was announced, and thus satisfied the requirements of Section 33(g)(2). *See Glenn*, 26 BRBS at 190-192. Consequently, we reject employer's assertion that it is aggrieved because Section 33(g) would bar claimant from recovering benefits under the Act.[3] Therefore, employer faces no "direct and immediate hardship" as a result of our decision, and we reject employer's contentions regarding the ripeness of the issues. *See Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 141-142 (CRT).

Accordingly, employer's motion for reconsideration is granted, but the relief requested is denied. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

We concur:

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur with my colleagues' decision to grant employer's motion for reconsideration and to

[3]We express no opinion as to whether Section 33(g) would bar claimant from recovering benefits if he files a future claim. *See Cowart*, ___ U.S. at ___, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT).

deny the relief requested. In addition to completely agreeing with the rationale stated in my colleagues' opinion, I would also uphold dismissal of employer's appeal based on lack of jurisdiction as set forth in my concurring opinion in *Boone v. Ingalls Shipbuilding, Inc.*, 27 BRBS 250, 251-252 (1993) (*en banc*) (Brown, J., concurring). I do not believe that direct appeal of an order from the district director to the Board is a permissible procedure under the Longshore Act or its regulations. *See Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981); *see also Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990).

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JAMES F. BROWN
Administrative Appeals Judge